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Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
	)	
Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers	)	CC Docket No. 95-185

JOINT COMMENTS OF CHOICE ONE COMMUNICATIONS, NETWORK PLUS, INC., GST TELECOM INC., CTSI, INC., AND HYPERION TELECOMMUNICATIONS, INC.

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SUMMARY

This proceeding provides the Commission with an opportunity to assure, under the guidance provided by the Supreme Court's decision in *AT&T v. Iowa Utilities Board* ("*Iowa Utilities Board*"), that an appropriate range of network elements are available as unbundled network elements ("UNEs") to permit UNE-based entry as a viable mode of competitive provision of local telecommunications services.

The Commission possesses significant discretion to craft rules implementing incumbent local exchange carrier ("incumbent LEC") network unbundling obligations under the 1996 Act. The Commission should exercise this discretion, while appropriately defining "necessary" and "impair," by reestablishing its initial approach to fashioning unbundling obligations while also supplementing that approach in light of the nearly three years experience gained since passage of the 1996 Act.

A national framework governing incumbent LEC unbundling obligations -- comprised of a national list of minimum UNEs which all incumbent LECs must make available -- is permissible under the Act and would facilitate provision of competitive services. The Commission should establish definitions of "necessary" and "impair" based on the extent to which use of alternatives to incumbent LEC network elements would materially adversely affect the ability of competitive providers to provide service in terms of cost, quality, ubiquity, and timeliness of service. The Commission should recognize that few, if any, incumbent LEC network elements are proprietary to which the more stringent "necessary" standard would be applicable.

The Commission should reestablish the initial seven UNEs identified in the *Local Competition Order* and, based on its experience over the last three years, identify additional UNEs that would promote the pro-competitive goals of the Act.

The Commission should not establish sunset dates for UNEs. It is not possible to know in advance when any network elements should be removed from the list. The Commission should adjust the national list of minimum UNEs by periodic reviews based on industry comments.

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Choice One Communications, Network Plus, Inc., GST Telecom Inc., CTSI, Inc., and Hyperion Telecommunications, Inc. ("Joint Commenters") submit these comments in response to the Commission's Notice of Proposed Rulemaking[1] in the above-captioned proceeding initiated on remand from the Supreme Court's decision in *AT&T v. Iowa Utilities Board* ("*Iowa Utilities Board*")[2] vacating the Commission's initial rules defining what unbundled network elements ("UNEs") incumbent local exchange carriers must make available under Section 251(c)(3) of the Communications Act.[3] The Joint Commenters urge the Commission in this proceeding to take steps that will assure access to UNEs as a realistic and practical alternative for entry into the local

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1 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98 & 95-185, Second Further Notice of Proposed Rulemaking, FCC 99-70 (rel. April 16, 1999) ("*NPRM*").

2 *AT&T v. Iowa Utils. Bd*, 119 S.Ct. 721 (1999).

3 47 U.S.C. § 251(c)(3).

telecommunications marketplace. Congress envisioned UNE-based entry as one of the key ways to achieve the pro-competitive goals of the Act. Joint Commenters urge the Commission in this proceeding to redesignate existing UNEs and establish new ones as discussed below.

I. A NATIONAL LIST OF MINIMUM UNEs WOULD SERVE THE PUBLIC INTEREST

The Joint Commenters strongly endorse the Commission's tentative conclusion to establish a "national policy framework" governing access to UNEs and a minimum set of UNEs that all incumbent LECs must offer.[4] There is nothing in *Iowa Utilities Board* that would limit the ability of the Commission to apply the statutory standards for identification of UNEs and establish a minimum list of UNEs. Moreover, the Supreme Court strongly endorsed the overarching authority of the Commission to establish rules implementing the local competition provisions of the Act.[5]

In addition, the numerous, repetitive requests to state commissions that they establish UNEs that would be necessary without a national minimum list of UNEs would constitute a substantial barrier to entry for competitive LECs because it would require competitive LECs to expend scarce capital in litigating these issues before state commissions rather than investing in resources that will increase the availability of competitive services. A national list of UNEs would provide for a more efficient implementation of the Act by providing for access to UNEs without the need for separate proceedings at either the state or federal levels whenever a competitive LEC requests a UNE. A substantial degree of uniformity in access to UNEs would ease burdens on new entrants by avoiding

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[4] *NPRM* at ¶ 13.

[5] *AT&T v. Iowa Utils. Bd.*, 119 S. Ct. at 730.

the need for market entry plans to address varying access standards. Accordingly, a national minimum list of UNEs would facilitate the development of competition.

Joint Commenters also submit that economic or technical conditions are sufficiently similar across the country to such an extent that a national minimum list of UNEs can be established.[6] Thus, for all practical purposes, incumbent LECs use the same technology, or a limited set of technologies, in provision of service. Accordingly, the Commission in this proceeding should establish its proposed national list of minimum UNEs.

The Commission should provide that states may not apply statutory standards in the first instance to identify network elements that should be designated as UNEs. Instead, states should be permitted to establish additional UNEs beyond the minimum national list pursuant to federal rules and guidelines that the Commission will establish in this proceeding. The Commission should also provide that states may not remove UNEs from the list for application in their states. These measures will assure that the national minimum list of UNEs remains just that - a national list - and that states do not adopt conflicting decisions that could thwart the achievement of federal objectives. At the same time, the ability of states to establish supplementary UNEs will afford considerable flexibility to states to address any local conditions.

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[6] The Commission already requires providers of telephone networks to meet numerous national standards. *See* 47 C.F.R. Part 68. Similarly, most incumbent LEC (and for that matter competitive LEC networks) utilize standards developed by BellCore (now Telcordia). *See, e.g., Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 24012, ¶ 134 (rel. Aug. 7, 1998) ("*Collocation MO&O*").

II. THE COMMISSION HAS CONSIDERABLE DISCRETION IN IDENTIFYING UNES

The Joint Commenters submit that the Commission possesses considerable discretion under the Act and *Iowa Utilities Board* concerning designation of network elements as UNEs. The Act does not define "necessary" or "impair." Therefore, the Commission must define these terms. The fact that Congress did not define these terms shows that Congress intended to leave it to the Commission's reasoned discretion to do so. Further, the legislative history is silent on what meaning the Commission should give to these terms. If Congress had intended to narrowly circumscribe the Commission's authority in this area it would have directly done so. Accordingly, the Commission has considerable discretion under the statute in designating UNEs under the "necessary" and "impair" standards.[7]

Further, the Supreme Court did not give the Commission specific guidance on what UNEs should be made available. Rather, the Supreme Court only found that the Commission had not adequately considered the statutory "necessary" and "impair" standards and instructed the Commission that, in deciding what UNEs to establish, it must apply "some limiting standard, rationally related to the goals of the Act."[8] It directed the Commission to consider "the availability of elements outside the incumbent's network."[9]

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[7] The Supreme Court recognized that the Commission has considerable discretion in implementing the Communications Act when it stated "Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency." *At&T Corp. v. Iowa Utils. Bd.,* 119 S. Ct. at 738 (citing *Chevron v. NRDC,* 467 U.S. at 842-43).

[8] *At&T Corp. v. Iowa Utils. Bd.,* 119 S. Ct. at 734.

[9] *Id.* at 736.

Joint Commenters believe that in order to meet the Supreme Court's direction, the Commission need only "consider" the availability of network elements from sources independent of the incumbent LEC and establish some limitation on the requirement that incumbent LECs must make network elements available as UNEs in a way rationally related to the goals of the Act. However, there is no reason to believe the mandate of the Supreme Court could not be achieved under a number of possible limiting factors, some of which could establish substantial limits and others to a lesser degree.

Joint Commenters believe that the Commission can, and should, choose among possible limiting factors that address the issues raised by the Supreme Court but that also seek to preserve UNEs as a realistic mode of market entry. There is nothing in the statute or the Supreme Court decision that would preclude the Commission from selecting among possible limiting factors the ones that promote a wider availability of UNEs if the Commission determines that that would best achieve the goals of the Act. Joint Commenters urge the Commission to do so and exercise its discretion under the Act and the Supreme Court decision to designate an expansive list of UNEs that incumbent LECs must make available.

III. "NECESSARY" AND "IMPAIR"

A. The Limiting Standard Envisioned By The Supreme Court In Interpreting "Necessary" And "Impair" Should Be Based On The Practicality And Economics Of Obtaining Network Elements From Sources Independent Of The Incumbent LEC

As noted, the Supreme Court instructed the Commission that, in deciding what UNEs must be available, it must apply "some limiting standard, rationally related to the goals of the Act." It directed the Commission to consider "the availability of elements outside the incumbent's network."

Obviously, every network element - even loops - could be duplicated independent of the incumbent LEC if time and resources were not a factor. It is necessarily a question of the degree to which network elements can be duplicated from sources independent of the incumbent LEC that the Commission should consider in identifying network elements that will be UNEs. Therefore, Joint Commenters submit that the Commission must consider the extent to which network elements are available from sources other than the incumbent LEC as a matter of practicality and economics.

Joint Commenters believe that cost, quality of service, and timeliness of service are criteria for assessing the economic and practical impact of the unavailability of a network element as a UNE. Thus, the Commission should determine that access to a network element is "necessary," or its absence would "impair" the ability of competitive LECs to provide service, based on the extent to which obtaining a network element from sources independent of the incumbent LEC, or self-provisioning, would increase the cost of the element to the competitor, diminish the quality of service it could provide in comparison to that of the incumbent LEC, or delay the provision of service. The Commission should also consider the scope of availability of possible substitutes for network elements obtained from incumbent LECs, *i.e*, the extent to which elements are available from independent sources with the same ubiquity as incumbent-provided network elements.

Under this approach, for example, the Commission could determine that access to a proprietary network element is "necessary" when its unavailability as a UNE would make it impossible, as a matter of practicality and economics, for the competitor to provide a service at the same price and quality and in the same time frame as the incumbent LEC. The Commission could determine that the unavailability of a network element from an incumbent would "impair" a competitor's ability to provide service when that would, as a matter of practicality and economics,

materially or significantly lessen its ability to provide a service at the same price and quality and in the same time frame as the incumbent LEC. This approach would establish definitions of "necessary" and "impair" that would establish genuine limits on the availability of UNEs. It would therefore comply with the Supreme Court decision. At the same time, it could permit access to all UNEs without access to which competitive LECs' ability to provide service would be materially adversely affected in terms of cost, ubiquity, quality, or timeliness of service. Thus, a competitive LEC could duplicate portions of the network of an incumbent LEC but the cost and time to do so would materially and adversely affect its ability to compete at any time in the immediate future. This would delay the implementation of a "procompetitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition...."[10]

B. The "Essential Facilities Doctrine" Does Not Define "Necessary" Or "Impair"

The essential facilities doctrine is a doctrine of antitrust law, which originated in an old Supreme Court decision and has been developed and refined in a myriad of subsequent decisions.[11] The doctrine has been severely criticized by the leading commentators.[12] Given the fact that a

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[10] Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong. 2d Sess. 1 (1996).

[11] *United States v. Terminal Railroad Association*, 224 U.S. 383 (1912); *MCI Communications Corp. v. AT&T*, 708 F.2d 1081, 1132-33 (7th Cir. 1982) (reviewing modern cases).

[12] *See* IIIA Areeda and Hovenkamp, *Antitrust Law* ¶ 771c (1996) ("Areeda and Hovenkamp") ("Lest there be any doubt, we state our belief that the 'essential facility' doctrine is both harmful and unnecessary and should be abandoned").

major thrust of the 1996 legislation was to take issues of telecommunications policy out of the judicial antitrust arena and place them in the legislative/administrative arena,[13] the Commission should be reluctant to conclude, without more specific legislative direction, that one of its major responsibilities under the Act should be subject to a severely-criticized, largely judge-made doctrine of antitrust law.[14]

In any event, the essential facilities doctrine is fundamentally at odds with one of the basic premises of the Telecommunications Act of 1996, which was that there would be a variety of competitive entry strategies – some competitors relying wholly on resale, some on a mix of resale and unbundled elements, and some using their own facilities in combination with unbundled elements or resale or both.[15] The essential facilities doctrine requires that the facility be "essential to the plaintiff's survival in the market" and "not available from another source or capable of being duplicated by the plaintiff or others."[16] Thus the doctrine is confined to situation in which the *only* feasible competitive entry strategy is to use the "essential" facility. As soon as it is admitted that there is a variety of feasible strategies -- some of which may not require use of the facility -- then the facility is not "essential" and the doctrine does not apply. Accordingly, if the essential facilities doctrine were a measure of the unbundling obligation, unbundling would never be required where

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[13] *See* Telecommunications Act of 1996, Pub.L. No. 104-104, 110 Stat. 56, 143 (1996)

[14] *See* 141 Cong. Rec. S 7889 (June 7, 1995) (Sen. Pressler) (the1996 legislation was intended to "terminate the involvement of the Justice Department and the Federal courts in the making of national telecommunications policy").

[15] *Local Competition Order* at ¶ 12.

[16] Areeda and Hovenkamp at ¶ 773b.

a variety of entry strategies was feasible – even though Congress assumed competitive entry through unbundled elements would be only one of a variety of entry strategies under the Act.

Another indication of the inapplicability of the essential facilities doctrine is that in the Telecommunications Act of 1996 "many practices in the nature of refusals to deal are simply forbidden," without the case-by-case showing of market power and anti-competitive effects that would otherwise be required by section 2 of the Sherman Act in the absence of a showing of concerted action.[17] Accordingly, Professors Areeda and Hovenkamp correctly conclude that "the obligations created under the Telecommunications Act itself are significantly broader than those created under Sherman § 2."[18]

Moreover, there is a complete absence of legislative language in the Telecommunications Act of 1996 or legislative history invoking the "essential facilities" doctrine. Section 251(d)(2) itself uses a "necessary" standard for the unbundling of proprietary elements and an "impairment" standard for other elements. As a grammatical matter, the word "necessary" might be read as equivalent to "essential," although the term "necessary" frequently is regarded as a weaker term.[19] But the question would still arise why Congress did not use the term "essential facilities" if it intended to incorporate a specific judicial doctrine carrying that name.

In addition, the "impairment" standard established by section 251(d)(2)(B) for non-proprietary elements cannot be reconciled, even on a strictly grammatical basis, with the "essential

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[17] Areeda and Hovenkamp at ¶ 785b, p. 277.

[18] *Id.*

[19] For example, one definition of "essential" is "*absolutely* necessary; indispensable" (emphasis added). *Random House Unabridged Dictionary* 487 (1981).

facilities" doctrine. As noted, the essential facilities doctrine requires a showing that the facility is "essential to the plaintiff's survival in the market" and is "not available from another source or capable of being duplicated by the plaintiff or others."[20] By contrast, the dictionary definition of "impair" is "to make, or cause to become, worse; diminish in value, excellence, etc.; weaken or damage."[21] If a facility is "essential to survival in the market" and is "not available from another source or capable of being duplicated," then denial of access does not merely "weaken or damage" a competitor's ability to compete; it *destroys* its ability to compete. Thus a mere showing of "impairment" does not meet the essential facilities doctrine; and to read the "essential facilities" doctrine into the "impairment" standard would be a distortion of the statutory language.

There are other problems with using the "essential facilities" doctrine as an interpretive standard under section 251(d)(2). Under that doctrine, a competitor may be denied access to an "essential facility" if the incumbent has a "legitimate business purpose" for doing so.[22] The existence of a legitimate business purpose must be litigated on a case-by-case basis, and a variety of business purposes have been accepted by the courts as legitimate.[23] Case-by-case litigation of

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[20] Areeda and Hovenkamp at ¶ 773b.

[21] *Random House Unabridged Dictionary* 713.

[22] Areeda and Hovenkamp at ¶ 773e.

[23] *City of Anaheim v. Southern California Edison Co.*, 955 F.2d 1373 (9th Cir. 1992) (reservation of transmission capacity for incumbent's own customers); *State of Illinois v. Panhandle Eastern*, 935 F.2d 1469, 1485 (7th Cir. 1991) (legitimate for pipeline to exclude competitor in order to continue to sell to customers under long-term contracts, for which pipeline had obtained supplies on a take-or-pay basis).

business purpose would be particularly inappropriate in the telecommunications area and would undercut the Commission's determination to establish a national minimum list of UNEs.[24]

C. "Proprietary" Should Be Given A Narrow Role

The Joint Commenters believe that it is clear under the Act that "necessary" only applies to "proprietary" network elements. The language of Section 251(d)(2)(A) only can reasonably be interpreted in this fashion. Therefore, in establishing its national list of minimum UNEs the Commission need only apply the "necessary" standard to proprietary network elements.

Moreover, there is nothing in the statute or its legislative history pointing to any congressional intent that "proprietary" should be given an expansive interpretation. Joint Commenters submit that the Commission should craft a definition of "proprietary" that narrowly restricts the range of network elements that would be subject to the "necessary" standard. Joint Commenters believe that there are few network elements that could be considered proprietary under any reasonable definition of that term. By necessity, most network equipment and services are non-proprietary given the need for compatibility and inter-operability of interconnecting networks.

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[24] *Local Competition Order* 11 FCC Rcd at 15,531 (Commission noting that nationally applicable interconnection rules will reduce transaction costs for small businesses). Joint Commenters also point out that the essential facilities doctrine would create an opportunity for the incumbent LECs to litigate on a case-by-case basis the "essentiality" of every element that the Commission – and Congress – has assumed would be subject to the unbundling obligation. A taste of what might be expected, if the essential facilities doctrine were adopted as an interpretive guide, may be found in a September, 1995 article by a BellSouth attorney. Silverstein, *Essential Facilities and Refusals to Deal in Network Industries Facing Rapid Technological Change*, September 1995 Antitrust Report. The article points out that CAPs have "duplicated the transport function," that "technology [has begun] to permit feasible duplication of the switching function," and that "[i]n certain geographic areas the local loop may have already lost its 'essential facility' characteristics to some extent, and it is likely to lose these characteristics in many areas of the county in the near future." *Id.* at 7. In short, the incumbent LECs would view adoption of the essential facility doctrine as an invitation to challenge every element of the current unbundling obligation.

Proprietary network elements for all practical purposes are not deployed in incumbent LEC networks because this would preclude the ability of incumbent LECs and other carriers to obtain compatible interconnection. None of the Commission's original seven UNEs or those discussed below are proprietary.

IV. APPLICATION OF THE STATUTORY STANDARDS

A. The Commission Should Look At The Competitive Industry As A Whole In Establishing Minimum UNEs

Joint Commenters believe that the record in this proceeding is likely to reflect a range of market strategies for providing competitive local services. Some new entrants may seek temporary access to a wide range of UNEs as a way of entering markets and then shift to provision of service largely on a facilities basis. Others may plan to shift to facilities-based provision of service only in some markets and rely on UNEs in other markets to a significant extent permanently. Still others may plan to use a wide range of UNEs everywhere on a permanent basis.

Joint Commenters believe that these are all valid business strategies. Any of them can form the basis for provision of competitive services and thus would promote achievement of the pro-competitive goals of the Act.

Moreover, differing business plans of carriers can reflect the individual economic and practical realities that would be faced by a carrier in attempting to obtain network elements from sources other than the incumbent LEC. Even if some network elements are available from sources independent of the incumbent LEC, some competitive LECs may not be able to purchase or use them with the same utility in all areas in which they could otherwise provide service.

Joint Commenters submit that the Commission should not establish its national list of UNEs based on the experiences and plans of only one segment of the competitive industry. Instead, the competitive goals of the Act are most likely to be met if the Commission adopts a broader focus that accommodates the business plans of a variety of competitive LECs and also recognizes the differing economic realities faced by competitive LECs. A minimum list of UNEs based on a narrow perspective, or the largest competitive LECs, or those that already have substantial facilities in place, would not produce an availability of UNEs that would permit other competitive LECs to participate in meeting the goals of the Act. Accordingly, the Joint Commenters recommend that the Commission apply its definitions of "necessary" and "impair" to the experience of all competitive LECs. If any substantial record evidence suggests that for some competitive LECs access to a network element is necessary, or that its unavailability as a UNE would impair its ability to provide service, then the Commission should add it to its list of UNEs even if other competitive LECs do not need it as a UNE.

B. "Necessary" And "Impair" Can Be Balanced Against Other Factors

Section 251(d)(2) provides that the Commission will consider "at a minimum" the "necessary" and "impair" standards in determining what UNEs should be available. Joint Commenters submit that this direction clearly provides that the Commission may consider other factors in addition to the "necessary" and "impair" standards. Thus, the Commission is only required to consider those standards "at a minimum" in determining what network elements should be available as UNEs. While the Supreme Court made clear that the Commission may not ignore these criteria, there is no reason to believe that the Commission must ignore other factors and balance them against the "necessary and impair" standard in determining what network elements

must be made available as UNEs. Accordingly, the Commission should conclude that "necessary" and "impair" may be balanced against other factors.

Paramount among these other factors would be the extent to which the availability of a network element as a UNE would help achieve the pro-competitive goals of the Act. Joint Commenters submit that if the unavailability of a network element would make it less likely that the pro-competitive goals of the Act would be achieved, then the Commission can weigh this in the balance in deciding whether the element should be a UNE. For example, if, based on the record gathered in this proceeding, there is some basis for concluding that lack of access would impair competitors' ability to provide service but there is not a definitive or conclusive basis for making that determination, then the Commission could also consider whether designation of the element as a UNE would promote the goals of the Act. If designation of the element as a UNE would help promote the development of competition, or would preserve UNE-based market entry, then the Commission may under the statute, and should, designate it as a UNE notwithstanding imperfect evidence in the record concerning whether the network element meets the "necessary" or "impair" standards.

V. THE COMMISSION SHOULD REESTABLISH EXISTING UNES AND CREATE NEW ONES

A. The Commission Should Reestablish The Initial Seven Minimum UNEs

As discussed, the Commission has considerable discretion in balancing relevant factors and designating network elements as UNEs. Moreover, the Supreme Court determined only that the Commission needed to provide a better explanation of the "necessary" and "impair" standards, not that it could not reestablish the seven minimum UNEs. For the reasons explained below, each of

the original UNEs should be reestablished under the "impair" standard and the guidance provided by the Supreme Court.

In general, Joint Commenters believe that the factors cited by the Commission in the *Local Competition Order* in 1996 as to why the seven network elements should be UNEs apply with equal force today and would meet the "impair" standard as described above.[25] Thus, none of these elements is sufficiently available in terms of price, ubiquity, quality, and timeliness of provisioning such that its unavailability as a UNE would not materially impair competitors' ability to provide services. Accordingly, the Commission should redesignate them as UNEs.

The Joint Commenters also point out that eliminating any of these UNEs at this point could create significant industry disruption. Competitive LECs are employing these UNEs to a greater or lesser extent and the abrupt removal of them could prevent some carriers from providing service, or require some carriers to discontinue services they currently provide. If the Commission were to decide that some of original UNEs do not meet the "impair" standard, it should permanently grandfather any current use of them.

1. Loops

Joint Commenters fully support the Commission's "strong expectation" that loops will be subject to the unbundling obligation of Section 251(c)(3).[26] For all practical purposes, there are no alternatives to use of incumbent LEC loops in provision of competitive local services. While on a theoretical basis with unlimited time and resources parties could duplicate local loops, the

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[25] They would also meet the "necessary" standard although that is irrelevant because none of them are proprietary.

[26] *NPRM* at ¶ 32.

requirement that they do so would do more than impair their ability to provide service. It would virtually foreclose meaningful competition in provision of local services. Accordingly, the Commission should redesignate loops as UNEs.

2. Local and Tandem Switching

As noted by the Commission in the *Local Competition Order*, there are 23,000 central office switches in the U.S and it is unlikely that competitors could duplicate even a small percentage of these switches.[27] The Commission also recognized that it takes between 9 months and 2 years to install a switch.[28] These findings remain valid. Joint Commenters submit that a national framework under which competitive LECs must purchase large amounts of switching capacity independent of incumbents and additionally must experience large delays per switch would materially impair their ability to provide service.

The fact that competitive LECs can purchase switches does not warrant removing switching from the UNE list. Requiring competitive LECs to purchase switches would impair their ability to provide service because it would impose unnecessary and uneconomical levels of expense in that in some markets competitive LECs may only need relatively modest amounts of switching capacity. Competitive LECs cannot purchase million-dollar switches in order to handle a few calls. Further, it is not the experience of Joint Commenters that switching service is sufficiently available from third-party vendors in all markets so that switching as a UNE is not required to avoid impairment

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[27] *Local Competition Order* at ¶ 411.

[28] *Id.*

of their ability to provide service. Accordingly, the Commission should redesignate local switching as a UNE.

The Commission should also redesignate tandem switching as a UNE. The Supreme Court requires that the Commission examine whether an element is available from sources independent of the incumbent LEC. Simply stated, there is no practically or economically available alternative to incumbent tandem switching that would permit competitive LECs to provide service at comparable cost, quality, ubiquity, and timeliness as is permitted by access to tandem switching as a UNE.[29]

3. Interoffice Transmission Facilities

Incumbent LEC networks provide ubiquitous transport to virtually every end office in their services areas. Competitive providers of transport do not even come close to offering a comparable coverage. Nor do competitive providers make available small units of transport capacity at TELRIC prices. Therefore, especially for competitive LECs that may only need small amounts of transport capacity, it is not realistic to expect that competitive LECs could provide service at the same cost or within the same time frame if they were required to self-provision or obtain transport from sources independent of the incumbent LEC. And, it would be extremely costly for competing LECs to demonstrate on an office-by-office basis that transport is available from a source other than the incumbent LEC. Instead, that approach would lead to diminution in service quality, increased

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[29] *See id.* at ¶ 425.

cost, and delays in providing service. Accordingly, the Commission should keep interoffice facilities on the national UNE list.[30]

4. Databases and Signaling Systems

Signaling systems and call-related databases, including LIDB, Toll Free Calling, and AIN databases for the purpose of switch query and database response through the SS7 network are integral to the provision of contemporary telecommunications services. Joint Commenters submit that use of independent suppliers of database and signaling systems do not provide service at comparable cost, quality, or timeliness. In particular, the costs of services from independent vendors greatly exceed incumbent UNE services. Nor do independent vendors of these services offer them everywhere. As the Commission found in the *Local Competition Order*, alternatives to incumbent LEC signaling systems, such as in-band signaling, would provide a lower quality of service.[31] Accordingly, unavailability of incumbent LEC signaling systems and call-related databases as a UNE would impair competitors ability to provide service and this should be designated as a UNE.[32] Joint Commenters also point out that access to service management systems, which enable competitors to create, modify, or update information in call-related databases, is necessary for competitors to effectively use call-related databases. Accordingly, access to service management systems should also be required as part of this UNE.[33]

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30 *Id.* at ¶ 141.

31 *Id.* at ¶ 482.

32 *Id.* at ¶ 491.

33 *Id.* at ¶ 493.

5. Operations Support Systems ("OSS")

Operations Support Systems ("OSS") comprise the mechanisms by which competitive LECs obtain pre-ordering, ordering, provisioning, maintenance and repair, and billing functions associated with obtaining UNEs and services from incumbent LECs. Access is necessary to the ability of competitive LECs to provide service on a basis that is equal in quality to the service that the incumbent LECs provide to themselves. By definition, the incumbent LEC's own OSS cannot be obtained from some other party. Accordingly, the Commission must keep OSS on the national list of UNEs. The Commission should require that all incumbent LECs establish promptly an effective electronic interface to facilitate access to OSS.

6. Network Interface Device

The Network Interface Device ("NID") is the point of interconnection of the telephone network to the customer's inside wiring. For all practical purposes, it is part of the loop. Joint Commenters submit that there is no economic or practical alternative to use of the NID as a UNE that would enable competitive LECs to provide service. As found by the Commission, when a competitor deploys it own loops, the competitor must be able to connect its loops to customers' inside wiring, especially multi-unit buildings, in order to provide service.[34] Building owners often frustrate that process so the provision of a NID currently represents one (albeit not totally satisfactory) mechanism for gaining access to inside wiring in a multi-tenant building. Accordingly, the Commission should redesignate the NID as a UNE.

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[34] *Id.* at ¶ 392.

7. Operator Services and Directory Assistance

Joint Commenters submit that sources of operator services and directory assistance independent of the incumbent are not available at comparable cost, quality, ubiquity, and timeliness as incumbent-provided services. Without access to the incumbent directory assistance database, new entrants could not provide operator services and directory assistance concerning Incumbent LEC customers.[35] Accordingly, the Commission should redesignate operator services and directory assistance as UNEs.

B. New UNEs Should Be Established

This proceeding presents an opportunity for the Commission to examine the need for network elements to be designated as UNEs based on its three years of experience in implementation of the 1996 Act. Given that the local telecommunications marketplace is not yet competitive, the Commission should consider whether designation of additional UNEs consistent with the "necessary" and "impair" standards could help promote local service competition. Further, the Commission should examine whether, in light of technical developments, including the more realistic possibility of deployment of some advanced services, designation of additional UNEs could help assure the competitive development of these services.

Joint Commenters believe that designation of the following network elements as UNEs would promote competition and additionally comply with the "impair" standard. None are proprietary.

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[35] *Id.* at ¶ 538.

1. Sub-loop Elements

Loops consist of distribution plant, drops, and electronics. A sub-loop element is merely a portion of the loop such as the drop, a portion of distribution plant such as that between the subscriber's premises and intermediate access points, or loop electronics. In many situations there is no need for access to a sub-loop element because the entire loop is available as a UNE. However, as recognized by the Commission, in some cases the entire loop as configured in a given deployment is unsuitable for provision of some services.[36] Thus, digital loop carrier ("DLC") systems in the loop can preclude provision of advanced services. In these situations, the service could be provided by means of a sub-loop element to which the competitive LEC can extend its facilities. Sub-loop elements, as with the loop itself, are not realistically available from sources independent of the incumbent LEC. Accordingly, in these situations inability to access the sub-loop element as a UNE would impair competitive LECs' ability to provide service. Joint Commenters submit, therefore, that the Commission should designate sub-loop elements as UNEs.

The Commission should require incumbent LECs to provide as sub-loop elements: electronic components of the loop, drops, and portions of distribution plant that can be accessed by means of interconnection at remote pedestals, vaults, and outside or underground chambers where loops are currently accessed by incumbent LECs. Moreover, it is likely to be burdensome on incumbent and competitive LECs to try to identify on a case-by-case basis, or create an inventory of, loops in which access to sub-loop elements might be necessary to provide service. Accordingly, the

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[36] *See Collocation MO&O* at ¶¶ 166.

Commission should require incumbents to make sub-loop elements available throughout their service areas.

If the Commission does not designate sub-loop elements as UNEs, it should at least clarify that incumbents must permit interconnection at sub-loop points pursuant to Section 251(c)(2) of the Act "as technically feasible point[s] within the carrier's network."[37]

2. Conditioned Loops

The Commission has recognized that conditioned loops - loops that are free from load coils and bridge taps - are necessary in order for competitive LECs to provide some types of advanced services.[38] Therefore, the unavailability of conditioned loops would impair competitive LECs' ability to provide advanced services. Accordingly, the Commission should designate conditioned loops as a UNE. The Commission should additionally reiterate its requirement that incumbent LECs condition loops on request.[39] This will ensure that incumbent LECs have the affirmative obligation to condition loops for competitors, not just make them available as UNEs where the incumbent LEC already has conditioned the loops. Under these requirements, competitive LECs may obtained conditioned loops as UNEs on request. The Commission should also provide that incumbent LECs must make conditioned loops available to competitors on the same terms and conditions at which they are made available to any incumbent LEC affiliates, including the payment of non-recurring charges, if any.

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[37] 47 U.S.C. § 251(c)(2)(B).

[38] *See Collocation MO&O* at ¶¶ 53.

[39] *Id.*

3. Extended Link

Collocation can enable a competitive LEC to make connections between UNEs. Thus, a competitive LEC can use collocation space to connect the loop and transport. This would normally be accomplished by means of a multiplexer. However, competitive LECs are not always able to obtain collocation at each central office where it might be desirable. In other situations, collocation space might be available but it is not economically justifiable because the competitive LEC does not have enough customer traffic to justify the expense. In still other situations, a competitive LEC may simply find that collocation as its standard means of interconnection is not feasible under its business plan.

In these situations, where the competitive LEC needs a loop and transport, it will not be able to provide service as a matter of practicality and economics unless it can obtain the loop and transport appropriately connected by means of a multiplexer as one element. This is because the competitive LEC will have no practical way to obtain and connect the loop and transport elements. Provision of the extended link as a UNE should not be burdensome since these same elements are combined to provide tariffed special access. Joint Commenters see no reason why this service cannot be offered in its unbundled form as an extended link at the cost-based price required by the Act. Accordingly, the Commission should designate the so-called "extended link" comprised of the loop, multiplexer, and transport as a UNE.

4. Intra-Building Wiring

Intra-building or inside wiring is essentially the "last one hundred feet" of the loop. Over the last decade the Commission has taken significant steps to increase the ability of customers and

competitive providers of services to install new, and reconfigure existing, customer premises wiring.[40] However, the Commission's inside wiring programs do not address situations where it is not practical or economical for competitive LECs to reconfigure or install new customer premises wiring. Thus, in most customer installations, especially in multi-unit dwellings, competitive LECs will not be able to provide service if they must essentially rewire the building in whole or in part in order to provide service. Nor would this make any sense if existing wiring is suitable for provision of services. In addition, premises owners and tenants are not likely to tolerate, or pay for, unnecessary wiring alterations and installations. Finally, competitive LECs are often denied access to buildings even where tenants want a competitive service. Competitive LECs must have the ability to access and use customer premises wiring in order to be able to provide service. Accordingly, the Commission should designate customer premises wiring as a UNE.

The Commission should designate premises and building entrance facilities such as junction and utility boxes, house and riser cable, and horizontal distribution plant as UNEs. This would assure that competitive LECs are able to access the portions of customer premises wiring that are necessary to provide service.

Joint Commenters acknowledge that only wiring owned by the incumbent may be declared a UNE. However, the Commission should make clear that all wiring owned by the incumbent LEC

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[40] *Review of Sections 68.104 and 68.213 of the Commission's Rules Concerning Competition of Simple Inside Wiring to the Telephone Network and Petition for Modification of Section 68-213 of the Commission's Rules filed by the Electronic Industries Association,* CC Docket No. 88-57, Report and Order and Further Notice of Proposed Rulemaking, 5 FCC Rcd 4686 (rel. June 14, 1990); *Review of Sections 68.104 and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network,* CC Docket No. 88-57, Order on Reconsideration, Second Report and Order and Second Further Notice of Proposed Rulemaking, 12 FCC Rcd 11897 (rel. June 17, 1997).

will be a UNE even if it is on the customer side of the demarcation point. Joint Commenters stress that any access by competitive LECs to customer premises wiring as UNEs will be in furtherance of relationships with customers who have requested service from the competitive LEC. Thus, access to wiring on the customer's side of the demarcation point will be conducted in cooperation with the customer.

The Commission should further provide, however, that there should generally be no charge for access to customer premises wiring as a UNE because in most cases incumbent LECs have already fully depreciated it.[41] Allowing incumbent LECs to charge TELRIC for access to this wiring would permit a windfall recovery since, for the most part, they currently have negligible costs associated with customer premises wiring.

5. Dark Fiber

Dark fiber is inactivated fiber to which the customer can connect appropriate electronics to provide communications services to itself, or offer to others on a private or common carrier basis. Fiber cable has become the premier communications transmission facility combining low cost, efficiency, and huge capacity. Its broader availability from incumbent LECs would substantially promote competition in provision of local services. Generally, dark fiber is not available from third parties in the small portions of capacity that many competitive LECs would need to provide service. Accordingly, the unavailability of dark fiber from incumbent LECs impairs the ability of new

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[41] The Commission has previously prohibited incumbent LECs from exercising any ownership rights over simple inside wiring. *Inside Wiring Detariffing Order*, CC Docket 79-105, 51 Fed. Reg. 8498 (1986), ¶¶ 52, 57, *recon. in part, Inside Wiring Reconsideration Order*, 1 FCC Rcd 1190, *further recon.* 3 FCC Rcd 1719 (1988), *remanded on other grounds NARUC v. FCC*, 880 F.2d 1989. The term "simple inside wiring" refers to telephone wiring installations of up to four access lines. *See* 47 C.F.R. § 68.213.

entrants to provide service and it should be designated as a UNE because it cannot be duplicated in a practical and economic fashion from other sources.

6. New Transport Options

As explained, competitive LECs are not able to duplicate even a small percentage of incumbent LECs' ubiquitous transport networks either through self provisioning or purchase from independent providers. Joint Commenters urge the Commission in reestablishing interoffice facilities as a UNE to require that a full range of transport options be made available as UNEs. This should include SONET rings and all transport options that are available under tariff.

7. DSLAMs

Incumbent LECs terminate copper loops used to provide DSL service in digital subscriber line access multiplexers ("DSLAMs") in the central office. In central offices where collocation space is not available, new entrants will not be able to provide their own DSLAMs. In addition, in some incumbent LEC deployment of DLC systems competitive LECs will not be able to employ their own DSLAMs. Moreover, it is not Joint Commenters' experience that DSLAMs available from sources independent of incumbent LECs would not be available at comparable cost, quality, ubiquity, and timeliness to DSLAMs available as UNEs. Accordingly, Joint Commenters submit that the unavailability of DSLAMs as a UNE could substantially impair new entrants' ability to provide service and DSLAMs should be designated as a UNE. In addition, designating DSLAM as a UNE also will promote competitive choice in the availability of advanced telecommunications services.

VI. THE COMMISSION SHOULD ESTABLISH PERIODIC REVIEWS OF THE NATIONAL LIST OF UNES

Joint Commenters submit that the best way for the Commission to determine in light of changed market or technical conditions whether UNEs should be added to, or removed from, the national list is periodic reviews of the list based on a record gathered from industry comments. This would permit the Commission to update the list under the appropriate statutory standards.

Joint Commenters do not believe that the Commission could establish preset automatic mechanisms or triggers for removing UNEs that would not entail a substantial risk of harming competition by premature removal of UNEs. The Commission cannot foresee all the circumstances in this proceeding that may warrant continuation of a network element as a UNE. The Commission should reject the idea of sunset dates for certain UNEs. As discussed, the Commission is unable to predict with certainty when competitive LECs will no longer need a network element as a UNE. Moreover, sunset dates would undercut incumbent LEC incentives to comply with unbundling obligations, especially as the sunset date approaches.

VII. GLUE CHARGES SHOULD BE PROHIBITED

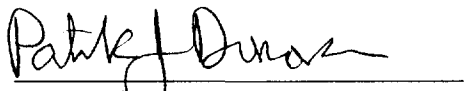
Joint Commenters are concerned that incumbent LECs will attempt to impose unjustified charges -- "glue" charges -- for connection of UNEs that the Commission may determine in this proceeding should be provided in combined form as a single UNE, such as the "extended link." Incumbent LECs may characterize these charges in various ways including as cross-connect or transport charges. However, there is no justification for these charges in that the UNEs are already combined in the incumbent's network. These charges are no more than incumbent LEC efforts to increase competitive LECs' costs of obtaining UNEs. Joint Commenters submit that they do not

conform to the pricing standards of Section 251(d)(1) of the Act. Accordingly, the Commission in this proceeding should prohibit imposition of any "glue" charges.

VIII. CONCLUSION

For the foregoing reasons, the Commission should adopt the recommendations in these comments.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Candise M. Pharr, hereby certify that I have on this 26th day of May, 1999, served copies of the foregoing Joint Comments of Choice One Communications, Network Plus, Inc., GST Telecom Inc., CTSI, Inc., and Hyperion Telecommunications, Inc. on the following via hand delivery:

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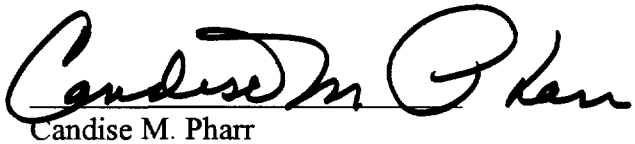

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